

HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

KEVIN BONNER,

Plaintiff,

v.

NORMANDY PARK, a municipal
corporation; and DETECTIVE JOHN
LIEVERO, in his individual capacity,

Defendants.

No. C07-0962 RSM

DEFENDANTS' RULE 26 AND 37
MOTION TO COMPEL DISCOVERY
AND FOR SANCTIONS

**NOTED FOR: FRIDAY,
JANUARY 11, 2008**

I. RELIEF REQUESTED.

Pursuant to Fed.R.Civ.P. 37, Fed.R.Civ.P. 26, Fed.R.Civ.P. 33, Fed.R.Civ.P. 34, Fed.R.Civ.P. 30(d)(3), and Fed.R.Civ.P. 36, Defendants City of Normandy Park and Officer John Lievero move the Court for an Order compelling Plaintiff to answer two Requests for Production regarding Plaintiff's notes prepared by him and reviewed by him to prepare for his November 29, 2007 deposition, Interrogatory No. 3 regarding financial stressors, two Requests for Production regarding checking account and tax records, two Requests for Production regarding production of criminal defense attorney billing invoices as a part of special damages, two Requests for Production regarding attorney billings and payments for legal proceedings pending during the timeframe in question, and to compel admissions as to the truth of a document previously entered in Court.

Defendants also seek a Rule 37 and 30(d)(2) order compelling Plaintiff to appear to

1 resume the deposition, and to provide an additional hour of deposition time beyond the
2 seven (7) hours provided in the Rules.

3 Defendants also seek an Order granting attorney fees and sanctions.

4 **II. STATEMENT OF ISSUES.**

5 1. Where Plaintiff relied on his own notes documenting the incident in question
6 to prepare for his November 29, 2007 deposition, should he be compelled to produce those
7 notes to Defense counsel?

8 2. Where Plaintiff is making a claim for emotional distress damages, his
9 medical records reflect a pre-existing anxiety disorder, his medical records reflect a
10 diagnosis of Post Traumatic Stress Disorder, and his medical records document substantial
11 financial stress in Plaintiff's family due to numerous civil and criminal legal proceedings
12 pending during the relevant timeframe, should Plaintiff be compelled to answer
13 interrogatories and requests for production that are targeted to determine the scope of the
14 financial stress on Plaintiff and related causation of alleged emotional damages?

15 3. Where Plaintiff is making a claim for recoupment of his criminal defense
16 attorney fees in the underlying municipal criminal prosecution, should Plaintiff be
17 compelled to produce those same attorney fee billings in response to a specific discovery
18 request?

19 4. Where Plaintiff entered into a Stipulated Order of Continuance in municipal
20 court and stipulated to particular facts sufficient to be found guilty of a crime, should the
21 Court compel Plaintiff to admit those same facts where Plaintiff has been served with
22 appropriate requests for admissions?

23 **III. EVIDENCE RELIED UPON.**

24 Declaration of Brenda Bannon, with attached copies of Second Request for
Production No. 2 (seeking Plaintiff's notes prepared by Plaintiff); Request for Production
No. 11 (seeking notes written by Plaintiff); Interrogatory No. 3 (seeking the amount of
money Plaintiff has provided to his daughter to assist with divorce/custody issues and day-

1 to-day living expenses); Second Request for Production No. 9 (seeking checking account
 2 records); Second Request for Production No. 4 (seeking a copy of receipts for out-of-pocket
 3 expenses); Second Request for Production No. 12 (seeking a copy of documents supporting
 4 any other special damages); Second Request for Production No. 5 (seeking a copy of
 5 Plaintiff's tax records); Second Request for Production Nos. 6 and 7 (seeking a copy of
 6 attorney billings received and made payments on for daughter's two 2005 custody matters);
 7 and Request for Admissions related to Stipulated Order of Continuance in municipal court.
 8 (Exhibits G, H, I, and J. *Dec. Bannon* at 42-69.) Also, relevant correspondence and
 9 excerpts from Plaintiff's November 29, 2007 deposition are attached. (Exhibits B, C, D, E,
 F, K, L, M, N, and O. *Dec. Bannon* at 18-41, 70-125.)¹

10 IV. FACTS.

11 In early October 2007 Plaintiff served Defendants with answers and objections to
 12 Defendants' First Requests for Production and Interrogatories. *Dec. Bannon* at 42-46 (Ex.
 13 G). In mid-November, 2007, Plaintiff served Defendants with responses and objections to
 14 Defendants' Second Requests for Production and Second Interrogatories to Plaintiff. *Id.* at
 15 47-58 (Exs. H and I). Plaintiff refused to provide his own notes of the incident in question,
 16 financial, checking, or tax records, or attorney billing records. In early November 2007,
 17 Plaintiff served Defendants with one admission and eight denials to Defendants' Requests
 18 for Admissions. *Id.* at 59-69 (Ex. J). On November 29, 2007, Plaintiff was deposed. *Id.* at
 19 78-125 (Ex. O (deposition transcript excerpts)). The deposition was videotaped and lasted
 20 for approximately five (5) hours. Pursuant to Fed.R.Civ.P. 37(a)(2)(B), after exhausting all
 21 questions and facing Plaintiff's continued objections, the deposition was adjourned pending
 22 the Court's resolution of outstanding discovery issues. *Dec. Bannon* at 4, ¶ 14, 115a (Ex.
 23 O, 240:19-241:11). Prior to the deposition, the parties had exchanged written
 correspondence regarding their positions on the legal issues that currently remain in
 dispute. *Id.* at 18-41 (Exs. B, C, D, E, and F). On December 7, 2007, prior to filing the

24 ¹ Defendants submitted the same declaration in support of the instant motion and the parallel Motion to
 Compel a Rule 35 IME; all arguments and factual matters are incorporated herein by reference.

1 instant motion, the defense conferred with Plaintiff's counsel to try to reach agreement. *Id.*
 2 at 1, 156-162.. This motion to compel followed.

3 During the course of Plaintiff's deposition, the Defense specifically asked Plaintiff
 4 if he possessed any of the documents responsive to the outstanding Requests for
 5 Production. Plaintiff indicated affirmatively that he possessed the documents either in his
 6 home or his business, Bonner Financial. *Dec. Bannon* at 90, 92-93 (Ex. O at 148:18-19;
 7 149:16-17; 226:2-24; 228:20; 229:3; 232:4-233:4). With respect to Interrogatory No. 3,
 8 Plaintiff affirmatively stated that he had not researched any response to that question. *Id.* at
 9 87 (Ex. O at 226:25-227:2). Plaintiff's counsel asserted that Plaintiff maintained a privacy
 10 objection. *Id.* at 86 (Ex. O at 224:17-225:7). Privacy and relevance was asserted as the
 11 basis for not providing the outstanding documents or not answering related questions. *Id.*
 12 Counsels' correspondence on these issues is attached to the Declaration of Brenda Bannon
 in support of the instant motion. *Id.* at 18-41 (Exs. B – F).

13 By way of background, this lawsuit stems from Plaintiff being arrested in the
 14 Normandy Park Police Department on April 25, 2005. *Id.* at 7-12 (Ex. A (Complaint)).
 15 During the course of affecting the arrest, a Taser weapon was discharged. Plaintiff claims
 16 his civil rights were violated. Plaintiff was ostensibly at the police station to provide
 17 information to Officer Lievero regarding an open domestic violence child abuse
 18 investigation; Plaintiff's wife, Nancy Bonner, was the suspect. Plaintiff arrived at the
 19 police station on April 25, 2005 with his wife, Nancy Bonner, their adult daughter, Karis
 Miles, and the victim of the assault allegation, 3 year old RM. *Id.* at 9.

20 Plaintiff claims emotional distress damages in this case (see parallel Motion to
 21 Compel Rule 35 IME). *Id.* at 11 (Ex. A at ¶ 4.2). To a large extent, in an effort to discover
 22 and evaluate additional life stressors that may be a proximate cause of Plaintiff's emotional
 23 distress in the pertinent timeframe, Defendants have propounded the discovery at issue. *Id.*
 at 42-58 (Exs. G, H, and I).

24 By way of further background, at the time the April 25, 2005 incident occurred,

1 Karis Miles and her three children were residing with Plaintiff. Miles was the subject of an
 2 ongoing felony prosecution in Pierce County for domestic violence malicious mischief.
 3 She also had two pending Pierce County custody proceedings regarding her three children,
 4 one brought by her ex-husband, Brent Miles, and one brought by her ex-boyfriend,
 5 Matthew Bjurback. By Plaintiff's own testimony at his deposition, he was financially
 6 supporting his own family, and Karis Miles' family. He was additionally supporting Karis
 7 Miles' legal matters, and making payments on the legal bills in all of these matters. During
 8 the relevant time frame, there was a jury trial in Pierce County in the criminal matter, and
 9 there was a custody trial in Pierce County in the Brent Miles custody dispute. Plaintiff has
 10 described his on-going financial distress with his treating physicians both before and after
 11 the April 25, 2005 event. *Dec. Bannon* at 35-39, 121, 90-91, 124, 131-147 (Ex F at pp. 3-7;
 Ex. O at 173:16-25; 146-152; 185; Ex. R (medical records)).

12 V. LEGAL AUTHORITY.

13 The burden of proof of establishing proper grounds is on the party seeking to limit
 14 discovery. *E.g., Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

15 1. Plaintiff's Notes (Request For Production No. 11 And Second Request For Production No. 2).

16 Plaintiff testified at his deposition that close in time to his April 25, 2005 arrest that
 17 he prepared notes to contemporaneously document the events surrounding his arrest. *Dec.*
 18 *Bannon* at 80 (Ex. O at 14:6; 17:2). Plaintiff reviewed those same notes to refresh his
 19 recollection while preparing for his November 29, 2007 deposition. *Id.*; *see, also* 12:12-14;
 20 13:1-16; 14:1-13. Plaintiff initially testified that neither attorney Hardy nor attorney Needle
 21 represented him at the time he drafted his notes. *Id.* at 79-80 (13:1-14:25). Plaintiff is
 22 currently asserting the attorney/client privilege. *Id.* at 161. Where a party relies on
 23 *arguable* work product documentation to prepare to be deposed, opposing counsel is
 24 entitled to production of the documents. *Wheeling-Pittsburgh Steel Corp. v. Underwriter's Laboratories, Inc.*, 81 F.R.D 8, 10 (ND Il. 1978); *U.S. ex rel Bagley v. TRW, Inc.*, 212

1 F.R.D. 554, 565 (C.D. Cal. 2003).

2 Following his deposition, Defense counsel sent Plaintiff a letter and another
3 discovery request again seeking production of these notes. *Dec. Bannon* at 151-155. 158
4 (Ex. T). Plaintiff has refused. *Id.* at 161. This Court should compel production.

5 **2. Financial Stress.**

6 a) **Plaintiff's financial hardship regarding daughter Karis Miles**
7 **(Interrogatory No. 3).**

8 Because financial stress is a potential alternative cause of Plaintiff's alleged
9 emotional distress, Defendants are entitled to discover sources of such financial stress. The
10 Defense is on no fishing expedition. Plaintiff has candidly discussed financial stress with
11 his treating physicians. *Dec. Bannon* at 35-36, 121, 131-147 (Ex. F at pp. 3-4; Ex. O,
12 173:16-25; Ex. R). At his deposition, Plaintiff acknowledged that he never researched the
13 answer to Interrogatory No. 3. *Id.* at 87 (Ex. O at 226:25-227:2). A recent decision from
14 the Eastern District of California makes the discoverability of this evidence clear. *Tatum v.*
15 *Schwartz*, 2007 U.S. Dist. LEXIS 45797 (E.D. Cal. 2007) (because relevancy is the test in
16 discovery, defendants were allowed to discover evidence regarding other stressors in
17 plaintiff's life that may have contributed to her alleged emotional distress to include arrest
18 of plaintiff and spouse, financial stresses in the marriage, child care issues, and former
19 spouses). Fed.R.Civ.P. 26(B)(1) permits discovery regarding any matter not privileged that
20 is relevant to the claim or defense of any party. Fed.R.Civ.P. 26(B)(1).

21 Defendants are allowed to discover evidence that may bear on issues of causation
22 related to Plaintiff's claim of severe emotional distress as a result of being arrested by the
23 Normandy Park Police Department on April 25, 2005. *Id.* Defendants are entitled to test
24 Plaintiff's assertion that his mental distress was solely a result of Defendants' conduct. *Id.*
At his deposition, Plaintiff acknowledged that in the April 2005 time frame, Plaintiff
financially supported his daughter and three children, to include providing for her housing,
living expenses, spending money, activities, food, clothing, and legal expenses for custody

1 and criminal proceedings. *Dec. Bannon* at 86-88a (Ex. O at 224:17–226: 24; 185:9–186:4).

2 In early 2005, Plaintiff's former son-in-law threatened to inundate him with
3 attorney-fees in the child custody proceeding. *Id.* at 119 (Ex. O at 154:2-6). In the prior
4 divorce, the son-in-law had threatened to bankrupt Plaintiff. *Id.* at 119 (Ex. O at 157:24-
5 158:2. Plaintiff told his psychiatrist he felt "trapped," and each new legal process cost him
6 "thousands of dollars." *Id.* at 91 (Ex. O at 151:21-24). Bonner also discussed with his
7 doctors his belief that because of his financial stress, he thought he would never be able to
8 retire. *Id.* (Ex. O at 151:17-20).

9 The Court should compel this discovery.

10 **b) Financial hardship evidence through production of Plaintiff's checking**
11 **account records, attorney billing records, and tax return records**
12 **(Second Requests For Production Nos. 9 and 5, and 6 and 8).**

13 Mere relevancy is a touchstone for disclosure at the discovery stage. *Id.* Six weeks
14 after Plaintiff's April 25, 2005 arrest, he saw a psychologist, Dr. Slightam, who provided
15 the following chart note:

16 The patient continues to be extremely angry, embittered about the entire
17 incident, even before the tazer episode. Issues have been brewing with his
18 daughter's ex-husband, a nasty divorce which lasted three years. Things
19 then were repeated with the daughter's ex-boyfriend and his mother. Wife
20 was supposed to attend today's session but accompanied their daughter to
21 court, dealing with a ticket that was issued about 10 days ago for an alleged
22 violation of a no contact order between the daughter and her ex-boyfriend
23 which supposedly occurred December 15. However, motion for no contact
24 was not filed until December 16 and not actually granted until sometime
after that. He continues to feel that he is being harassed. In addition, every
legal harassment and roadblock costs more thousands of dollars. He feels
very trapped. On top of all this, in his efforts to help the Normandy Park
Police Department in their investigation, he was assaulted, tazered, confined
and arrested. Pretrial motions are set for July 5.

Dec. Bannon at 35-36, 144-145 (Ex. F at pp. 3–4; Ex. R (Slightam chart no. 4 and 5).

Another District Court has made clear that discovery is broad regarding causation
and emotional distress damages: "The court concludes that a plaintiff who seeks to recover
for emotional distress damages is relying on her emotional condition as an element of the

claim.” *Fritsch v. City of Chula Vista*, 196 F.R.D. 562 (S.D. Calif. 1999). “To ensure a fair trial, particularly on the element of causation, the court concludes the defendants should have access to evidence that Fritsch’s emotional state was caused by something else. Defendants must be free to test the truth of Fritsch’s contention that she is emotional upset because of defendants’ conduct.” *Id.* at 569 (medical privilege waived when plaintiff seeks to recover for emotional distress damages).

Certainly for non-privileged matters such as financial records, tax records, and billing invoices, where financial stress is an acknowledged substantial contributing factor to emotional distress during the pertinent timeframe, Defendants should be granted broad latitude to test Plaintiff’s assertion that his emotional distress was caused by the Normandy Park Police Department. *Tatum v. Schwartz*. Plaintiff testified during his deposition that he has paid at least \$10,000 in attorney fees regarding some of the ancillary matters. *Dec. Bannon* at 90 (Ex. O at 149:18-19). This figure should be tested by the record of the documentation. The Court records reflect that \$15,000 was owing at the end of Karis Miles’ custody battle in early 2006; there was another full jury trial in Pierce County in January 2006 regarding Karis Miles’ criminal matter. *Dec. Bannon* at 126-128 (Ex. P). This is on top of Nancy Bonner’s criminal prosecution in 2005, Plaintiff’s criminal prosecution in 2005, the Matthew Bjurback custody proceeding in 2005 and 2006, and various civil harassment and protection order proceedings that were pending against Plaintiff and his family during this same timeframe with miscellaneous parties and the Bonner family. *Id.* at 90-91 (Ex. O at 146:24–152:5). Plaintiff still owed these attorney fees at the time of his deposition. *Id.* at 91 (Ex. O at 151:15-16). The Court should compel production of this discovery.

3. Plaintiff’s Criminal Defense Attorney Bills (Second Request For Production No. 4 and 12).

Plaintiff claims his damages include recoupment for his criminal defense attorney bills. *Dec. Bannon* at 11-12 (Ex. A at ¶ 4.4; Prayer for Relief 4). Some of these bills were

1 produced with the Initial Disclosures. Though the damages claim has not been withdrawn
 2 Plaintiff now asserts the attorney/client privilege in response to the discovery requests. *Id.*
 3 at 20-21 (Ex. B, ¶¶ 2-3), *Id.* at 161-162. The Defense also seeks a ruling on Plaintiff's
 4 assertion of attorney/client privilege as to these bills. At his deposition, Plaintiff said he did
 5 not know if he was in fact seeking these damages, despite his attorney's representations. *Id.*
 6 at 95-96 (Ex. O, 229:8-230:16). The Court should order production to allow the Defense to
 7 evaluate Plaintiff's assertion that \$5,237.50 attorney fees plus costs are proper and
 reasonable damages.

8 **4. Request for Admissions.**

9 Pursuant to Fed.R.Civ.P. 37(c), a party may seek the Court's intervention when it
 10 appears that a party refused to admit. Defendants provided Plaintiff with a Request for
 11 Admission regarding a previous stipulation entered in municipal court. *Dec. Bannon* at 59-
 12 69 (Ex. J). Although Plaintiff admitted that he signed the document entitled "Stipulated
 13 Order of Continuance" in open court on December 6, 2005, he specifically denied the
 14 factual statements he had previously stipulated to in court. *Id.*; *Dec. Bannon* at 162. At his
 15 deposition, he testified he recognized the document (Requests for Admissions) but did not
 16 sign it. *Dec. Bannon* at 98 (Ex. O, 39:20-41:24). Under Rule 36, "the party who has
 17 requested the admissions may move to determine the sufficiency of the answers or
 18 objections." Fed.R.Civ.P. 37(a). The Court may enter an order that the matter is admitted
 if appropriate, and may order expenses necessary to bring a motion. Fed.R.Civ.P. 36(a);
 37(a)(4). Under these circumstances, Defendants urge the Court to enter both remedies.

19 **VI. SANCTIONS.**

20 Defendants, pursuant to Rule 37(a)(4)(A), seek sanctions and appropriate attorney
 21 fees. Plaintiff has refused to provide non-privileged discovery without seeking a Protection
 22 Order. Ordinarily a party must seek a protective order before the date set for the discovery
 23 response or deposition. *E.g., Pioche Mines Cons., Inc. v. Dolman*, 333 F.2d 257, 269 (9th
 24 Cir. 1964); *F.A.A. v. Landy*, 705 F.2d 624, 634 (2nd Cir. 1983). Plaintiff never sought a

1 ruling from the Court on his “privacy” objections. Plaintiff refused to even research
2 Interrogatory No. 3, targeting other financial stressors. *Dec. Bannon* at 87 (Ex. O, 227:2).

3 Additionally, Plaintiff was improperly directed many times during his deposition
4 not to answer questions. *Dec. Bannon* at 101-102, 104-108 (Ex. O, 35:7-19; 40:7-25;
5 76:25; 128-3; 138:18, 139:3-4; 231:16, 233:8). “Except where a question calls for
6 privileged information, it is considered improper for counsel at a deposition to instruct a
7 deponent not to answer.” *E.g., Smith, et al. v. Logansport Community Schl. Corp.*, 139
8 F.R.D. 637 (N.D. Ind. 1991), *et al.* Plaintiff was repeatedly improperly prompted during
9 his deposition (*e.g.*, “if you know,” “the answer’s yes or no”) while a question was pending.
10 *Id.* at 110-115 (Ex. O, 14:12; 15:1, 32:12; 43:18; 139:21, 140:13; 222:23, 225:6). Counsel
11 are forbidden from “speaking objections” to “coach” a deponent. *E.g., Hall v. Clifton*
12 *Precision*, 150 F.R.D. 525, 530 (E.D. PA 1993). Plaintiff provided evasive answers to
13 direct questions during his deposition. *Id., et al.* Under Rule 36, Plaintiff refused to admit
14 to factual matters that he had previously stipulated to in open court. *Id.* at 59-69.

15 Fed.R.Civ.P. 37(a)(4) provides for an award of expenses or sanctions for a party’s
16 refusal to provide proper discovery, where such necessitated the opponent to bring a motion
17 to compel. Fed.R.Civ.P. 37(a)(4). For purposes of Rule 37, “an evasive or incomplete
18 disclosure, answer, or response, is to be treated as a failure to disclose, answer, or respond.”
19 Fed.R.Civ.P. 37(a)(3). Additionally, under Fed.R.Civ.P. 30(d)(3), the Court may award
20 appropriate sanctions for counsel’s objections where they have frustrated “a fair
21 examination,” or unreasonably prolonged an examination. *E.g., Van Pilsum v. Iowa State*
22 *Univ.*, 152 F.R.D. 179, 180 (S.D. IA 1993). Plaintiff’s counsel’s conduct in overall
23 aggressively stonewalling in the discovery process requires sanctions.

24 VII. CONCLUSION

The defense seeks a Court order to compel Plaintiff’s answers to properly served
interrogatories, a series of requests for production pertaining to financial stress, and
Plaintiff’s admissions to Defendants’ Requests for Admissions. The defense also seeks

1 sanctions and attorney fees for having to bring this motion in the first place. Pursuant to
2 Fed.R.Civ.P. 37 and 30(d)(2), Defendants seek an Order to resume Plaintiff's deposition
3 and to allow an additional hour of deposition time (8 hours total). Please see attached
4 Proposed Order.

5 DATED this 21st day of December, 2005.

6 KEATING, BUCKLIN & MCCORMACK, INC., P.S.

7 s/Brenda L. Bannon

Brenda L. Bannon, WSBA 17962

8 Attorney for Defendants

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DECLARATION OF SERVICE

I hereby certify that on December 21, 2007, I electronically filed DEFENDANTS' RULE 26 AND MOTION TO COMPEL DISCOVERY AND FOR SANCTIONS with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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